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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund;
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WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,

vs.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above case on October 12, 1966.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 83.Or Adv Sh 235, 419 P2d 38. It is printed in Appendix B, infra 17.

JURISDICTION

The judgments of the Supreme Court of Oregon were entered October 12, 1966, infra 29. Petitioners did not petition for rehearing. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Whether state courts are pre-empted by the Labor Management Relations Act of 1947, as amended, of jurisdiction over suits against trustees of health and welfare and pension trusts to recover contributions paid under illegally coerced collective bargaining agreements which have been set aside by the National Labor Relations Board.

2. Whether the decision of the National Labor Relations Board setting aside contracts under which employers contributed to health and welfare and pension trusts affected the contract rights of the trustees to hold and administer the contributed funds.

STATUTES INVOLVED

The statutes involved are the Labor Management Relations Act of 1947 (61 Stat 136, 29 USC § 141 et

seq), as amended, and the Welfare and Pension Plans Disclosure Act (72 Stat 997, 29 USC § 301 et seq), as amended. The provisions particularly involved are printed in the Appendix A, infra 13.[1]

STATEMENT OF THE CASE

These cases, which were consolidated in the court below, were brought by petitioners against the trustees of health and welfare and pension trusts to recover contributions paid under collective bargaining agreements which the National Labor Relations Board (the Board) set aside on the ground that they had been procured through illegal duress, restraint and coercion by the union in violation of federal law. Petitioners alleged that the Board in its decision

> "* * * thus duly made, ordered that said separate contract or purported contract was illegal, voided, set aside and of no effect." (R 3, 21, 38)[2]

The complaints alleged that the money had been paid prior to the Board's decision, that it "would not have been paid" except for the contracts, that neither

1. Those provisions are 29 USC § 158(b)(1), (3); 29 USC § 160(a), (b) and (c); 29 USC § 186(a), (b) (1) and (c); and 29 USC § 309 (b).

2. The Board's decision is reported at (1963) 141 NLRB 469. Petitioners also sought judgment against the union for these sums and for sums paid to union members under the illegal agreements. The court below held that the claims against the union were also pre-empted by LMRA. This petition does not challenge that determination, but only the decision that actions would not lie against the trustees.

the trusts nor the trustees were or could be parties to the Board proceedings, and that there were no Board procedures available to petitioners to recover the money (R 3; 21, 38).

The respondent trustees demurred on the grounds that the court lacked jurisdiction over the subject matter of the suits and that the complaints did not state a cause of suit. The basis of the demurrers was the contention that petitioners' claims were pre-empted by LMRA (R 10, 28, 45).

The trial court sustained the demurrers, and the Supreme Court of Oregon affirmed. As to the trustees, it stated:

> "Plaintiff makes the contention that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of plaintiff's claims against the trustees. Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. As has been previously quoted in this opinion from Garmon: '* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State

to grant *a remedy* here *which has been withheld from the National Labor Relations Board* only accentuates the danger of conflict.' (Emphasis added.)" (R 61; infra 25)

REASONS FOR GRANTING THE WRIT

The court below decided important questions of federal law which have not been, but should be, settled by this Court.

I.

The court below erroneously held that the suits, which were against persons not parties to the agreements or the Board proceedings, invaded the jurisdiction of the Board to remedy unfair labor practices and were pre-empted by the Act.

a. The rapid growth of health and welfare and pension trust funds and their importance in American industry have been recognized by this Court. *Lewis v. Benedict Coal Corp.*, (1960) 361 US 459 at 469-470. Except as such trusts are regulated by 29 USC § 186 of LMRA and the Pension Fund Reporting and Disclosure Act (29 USC § 301) this growth has taken place within the framework of collective bargaining.[3] There are literally thousands of such funds, administered by trustees

3. Health and welfare and pension trusts are a subject of compulsory bargaining under § 8(a)(5) of LMRA. *Inland Steel Co. v. National Labor Relations Board*, (CA 7 1948) 170 F2d 247 at 251, cert den (1949) 336 US 960; *W. W. Cross & Co. v. National Labor Relations Board*, (CA 1 1949) 174 F2d 875 at 877-878.

who are appointed in equal numbers by employers and labor organizations and are third party beneficiaries of the collective bargaining agreements. The rights of the trustees are derivative and rise no higher than those of the immediate parties to the agreement. *Lewis v. Lowry*, (CA 4 1961) 295 F2d 197 at 199, cert den (1962) 368 US 977, reh den (1962) 369 US 813. The relationship between such trusts and the jurisdiction of the Board over unfair labor practices is a matter of great importance which has never been considered by this Court.

b. These actions, in effect, sought to wind up the affairs of the trusts as to these employers and recover the funds previously paid to them, on the ground that the agreements under which the contributions were made had been set aside by the Board.[4] So far as we can determine, the question whether such suits are pre-empted has never before been decided by any court; however, the available authority strongly suggests that the court below was wrong. Its decision is in conflict with the decisions of other state courts, which have uniformly held that such trusts are subject to state law, and that the federal statutes do not pre-empt control

4. See generally ALI, Restatement of Restitution (§ 167) 679; Bogert, Trusts & Trustees (2d Ed 1965) 303-304 (§ 44); Bogert, Trusts & Trustees (2d Ed 1960) 40-41 (§ 473). The substantive Oregon law, which the court below did not question, is found in *Suitter v. Thompson et ux*, (1961) 225 Or 614 at 624-626, 358 P2d 267; *Meyer v. Barde et al*, (1924) 112 Or 197 at 211, 228 Pac 121.

over them, including controversies over their winding up and the disposition of their funds. Indeed, the cases note that Congress affirmatively excluded pre-emption over their affairs in 29 USC § 309(b).

Thacher v. United Construction Workers (etc.), (1962) 10 NY 2d 439, 180 NE 2d 245, 224 NYS 2d 657

People v. Automobile Transportation Welfare Fund, (1962) 17 App Div 2d 448, 235 NYS 2d 702 at 705-707, aff'd (1963) 13 NY 2d 814, 192 NE 2d 222, 242 NYS 2d 345, cert den (1964) 376 US 908

Cox v. Superior Court of San Bernardino County, (1959) 52 Cal 2d 855, 346 P2d 15 at 18-20

Anno: 88 ALR 2d (1963) 493 at 506-507 and cases there cited

Note, 30 Fordham L Rev 537 (1962)

The question most frequently litigated is more limited: Whether federal courts have any jurisdiction at all over controversies involving welfare funds in the absence of any claim of violations of Taft-Hartley restrictions on payments to employee representatives (29 USC § 186(a), (b)). The weight of authority is that they do not, e.g., *Moses v. Ammond*, (DC SD NY 1958) 162 F Supp 866 at 871-874.

c. It is unlikely that any remedy exists in this or sim-

ilar cases if the decision of the court below is accepted. Board orders to remedy unfair labor practices run against parties to the proceedings who have committed them, whether employers or labor organizations, or their agents.[5] The trustees in these cases were not parties to the Board proceeding or the order, and there was no claim before the Board or in the court below that they were agents of the union or participated in its unfair labor practices.[6] Indeed, the wrongful acts were committed in the course of securing the contract, not in its performance. The trustees merely received funds paid to them under illegally-secured agreements.

The lack of any Board remedy, and the lack of conflict between the policy of the Act and the remedy sought in state court support the view that pre-emption does not extend to these claims against the trustees. *Linn v. United Plant Guard Workers*, (1966) 383 US 53 (15 L Ed 2d 582 at 590-591); *United Steelworkers v. American Internat'l Aluminum Corp.*, (CA 5 1964) 334 F2d 147 at 153.

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5. See 29 USC § 158(a), (b); 29 USC § 160 (a), (b) and (c); *National Marine Engineers Beneficial Ass'n v. N.L.R.B.*, (CA 2 1960) 274 F2d 167 at 170-171. Under 29 USC § 152(13), common law principles of agency control the responsibility of either for the acts of third parties, e.g., *N.L.R.B. v. International Longshoremen's & Ware. Union*, (CA 9 1960) 283 F2d 558 at 563.

6. The Board has twice entered orders against trustees and trusts operated under collective bargaining agreements based on its findings in both cases that the trustees were "agents" of the union or the employer (or both) under the trust agreements and that they had themselves committed unfair labor practices in the course of administering the trusts. *Local 80, Sheet Metal Workers*, (10/21/66) 161 NLRB No. 7; *J. J. Hagerty, Inc.*, (10/31/62) 139 NLRB 633, enf'd in part, *Local 138, Internat'l U. of Operating Engineers v. N.L.R.B.*, (CA 2 1963) 321 F2d 130 at 137.

The relationship between the regulation of these trusts under state law and the exclusive jurisdiction of the Board to remedy unfair labor practices should be defined by this Court.

I.

The court below erroneously held that the Board's decision had no effect on the derivative contract rights of the trustees in state court proceedings.

In its decision, the court below refused to give effect to the Board's decision in suits against third party beneficiaries of the agreements whose rights were wholly derivative and dependent upon its validity. It did so on the ground that judgments for petitioners would constitute a remedy for the union's unfair labor practices and would invade the Board's exclusive jurisdiction over them. The effect of the decision is to allow the trustees to retain the money and continue to administer it under the terms of an agreement which the Board has declared to be invalid.

It is established that a collective bargaining agreement procured through unfair labor practices is not partially valid, but falls in its entirety,[7] and following such determination no court can compel further per-

7. *Garment Workers v. NLRB*, (1961) 366 US 731 at 737.

formance of the contract by any party to it.[8] However, the question of the effect on third party rights of a Board decision setting aside a collective bargaining agreement was reserved for future consideration in *National Licorice Co. v. National Lab. Rel. Board*, supra, (1940) 309 US 350 at 365:

> "The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. It does not foreclose the employees from taking any action to secure an adjudication upon the contracts nor prejudge their rights in the event of such adjudication. We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. * * *"[9]

The decision of the court below that claims against third parties whose rights depend on the validity of the

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8. *National Licorice Co. v. National Lab. Rel. Board*, (1940) 309 US 350 at 365; *Pittsburgh P. Glass Co. v. National Labor Rel. Bd.*, (1941) 313 US 146 at 155; *Carey v. Westinghouse Electric Corp.*, (1964) 375 US 261 at 272; see generally Anno: 153 ALR 60 at 87 (1944).

9. See also *Revere Copper and Brass, Incorporated v. N.L.R.B.*, (CA 7 1963) 324 F2d 132 at 136-137. In *National Labor R. Board v. Indiana & Michigan Elec. Co.*, (CCA 6 1941) 124 F2d 50 at 55, aff'd (1943) 318 US 9 the court concluded that in *National Licorice* and in *National Labor Rel. Bd. v. Pennsylvania G.-Lines*, (1938) 303 US 261

> "* * * the contracts were void ab initio. * * *"

contract are pre-empted by the Act requires that this question should now be answered.[10]

The case is no different from one to recover possession of property held under a lease or other agreement which has been determined to be invalid. In fact, it is stronger. The trustees' right to hold and administer the funds is wholly dependent upon the contract which the Board set aside; they have no beneficial interest in the funds at all. The court below did not deny that Oregon law in any other case would impose a constructive trust on the funds upon the failure of the express trusts. However, it concluded that to do so in this case would invade the Board's jurisdiction over unfair labor practices.

The question is not whether granting relief in these cases would remedy an unfair labor practice; rather, by failing to grant it, and by allowing the trustees to retain and continue to administer the funds, the court below effectively enforced collective bargaining agreements which the Board had set aside in their entirety. In effect, it denied that the Board's decision could be recognized in the case. The question of the effect of the Board's decision on the derivative contract rights of the trustees should be resolved by this Court.

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10. That the interests of the trusts are separate from those of the union was established in *Lewis v. Benedict Coal Co.*, supra, (1960) 361 US 469.

CONCLUSION

The questions presented are important ones, and their resolution by this Court is imperative. In its decision, the court below held that the subject matter of the action was not within its jurisdiction; the result of the decision is to effectuate a contract which the Board has declared to be illegal under federal law and violative of federal policy. Its error and confusion can only cause grave concern among those charged with administering the national labor policy.

The foregoing petition for a writ of certiorari to the Supreme Court of the State of Oregon should be granted.

Respectfully submitted,

JAMES C. DEZENDORF
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December 19, 1966

APPENDIX A

29 USC § 158, July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

* * * (b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

29 USC § 160, June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; August 28, 1958, Pub. L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub. L. 86-257, Title VII, §§ 704(d), 706, 73 Stat. 544.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * *

29 USC § 186, June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub. L. 86-257, Title V, § 505, 73 Stat. 537.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *

* * * * *

(b) (1) It shall be unlawful for any person to bequest, demand, receive, or accept, or agree to re-

ceive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sick ness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by

interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; * * *

29 USC § 309, Pub. L. 85-836, § 16, formerly § 10, Aug. 28, 1958, 72 Stat. 1002, renumbered and amended Pub. L. 87-420, § 16(a), (b), Mar. 20, 1962, 76 Stat. 38, 41.

(b) The provisions of this chapter, except subsection (a) of this section and section 308d of this title, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OREGON
In Banc

Corvallis Sand & Gravel Co., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701; P. R. Wages, Clyde Johnson, and Carl Reams, Individually and as Representatives of a Class to Which They Belong; P. R. Wages, Clyde Johnson, Carl Reams, M. A. Erland, W. Ray Rogers and Leonard Runkle as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. Wages, Clyde Johnson, Carl Reams, M. A. Erland, W. Ray Rogers, Leonard Runkle and Wm D. Robertson, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

Eugene Sand & Gravel, Inc., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701 et al,
Respondents.

Wildish Sand & Gravel Co., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701 et al,
Respondents.

HOLMAN, J.

Three identical suits in equity have been combined for the purpose of this appeal. In each instance the defendants are the Hoisting and Portable Engineers Local Union No. 701, the trustees of the union's health and welfare fund, and the trustees of its pension fund. The plaintiffs are three employers who individually entered into collective bargaining agreements with the defendant union. The relief sought is rescission of the agreements, restitution of the sums paid thereunder, and an accounting to determine the amounts so paid. Plaintiffs sought to recover from the union the additional wages paid to its members, and from the health and welfare trustees and pension trustees the sums paid to their respective funds for the benefit of members of the union. Plaintiffs have appealed in each case from the trial court's dismissal of their complaints when they refused to plead further following the sustaining of defendants' demurrers.

Plaintiff's complaints in each instance alleged as follows:

"V.

"* * * defendant, Local 701, engaged in a course of conduct involving threats, duress and coercion against plaintiff. Such conduct consisted of picketing, threats of picketing, strike action and threats of strike action. By such conduct, Local 701 * * * obtained and coerced a separate contract or purported contract from plaintiff * * *.

"VI.

"Said course of conduct of defendant Local 701 * * * was found to be illegal and in violation of federal law by the National Labor Relations Board by its determination which was duly made and which was issued March 13, 1963. The National Labor Relations Board * * * ordered that said separate contract or purported contract was illegal, voided, set aside and of no effect.

"VII.

"As a consequence of said * * * voided contract, and as a direct and proximate consequence of defendant Local 701's conduct * * * as above described, plaintiff has paid to * * *."

The grounds for the demurrers were that the court did not have jurisdiction over the subject matter and that the complaints did not state causes of suit. Defendants claimed the trial court lacked jurisdiction because the subject matter is pre-empted by the Labor Management Relations Act (LMRA) to the exclusive jurisdiction of the National Labor Relations Board (the Board) and that the complaint did not state a cause of suit because it showed plaintiffs sought, obtained and accepted relief from the Board without asking for the relief sought by the present suits.

The principal issue involved in this case is whether Congress has so pre-empted to the Board the field of labor relations as to deprive state courts of authority to grant the relief of rescission here sought. The plaintiffs

charged before the Board, and the Board found, that the union was guilty of unfair labor practices under the Labor Relations Management Act, 61 Stat 141, § 8(b)-(1)(B) and (3) (1947), 29 USC & 158(b)(1)(B) and (3) (1964). The unfair practices were refusing to bargain collectively with a multiemployer group of which plaintiffs were members, and by strikes and threats of strikes coercing plaintiffs into breaking away from such group and contracting with the union independently.

In determining the intent of Congress concerning pre-emption the Supreme Court of the United States used the following language in Garner v. Teamsters Union, 346 US 485, 490-491, 74 S Ct 161, 98 L ed 228 (1953), which was quoted with approval in San Diego Bldg. Trades Council v. Garmon, 359 US 236, 242-243, 79 S Ct 773, 3 L ed2d 775 (1959):

> " 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals

and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . .' "

There can be no doubt that the Board had the exclusive authority to determine whether the actions of the union were unfair labor practices under the Act. Plaintiffs do not otherwise contend. Having found that the union was guilty of unfair labor practices, is the fashioning of the remedy for these infractions of labor ethics within the sole province of the Board, or may state courts decree the contract is rescinded from its inception?

In San Diego Bldg. Trades Council v. Garmon, supra, the court said:

"* * * Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See Garner v. Teamsters Union, 346 US 485, 492-497. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanc-

tion either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, *since remedies form an ingredient of any integrated scheme of regulation*, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." (359 US 246-247). (Emphasis added.)

Again, in I. A. of M. v. Labor Board, 311 US 72, 82, 61 S Ct 83, 85 L ed 50 (1940), the court without any dissent said as follows:

"* * * Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. *It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.* National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 US 261, 271; National Labor Relations Board v. Falk Corp., 308 US 453, 461. * * *" (Emphasis added.)

The determination of the relief to which a party to a collective bargaining agreement may be entitled, where the agreement was obtained by unfair labor practices, is sufficiently important in the regulatory process as to be within the sole province of the Board.

There would be no logical distinction between regulation by a remedy such as injunction or an action for damages, on the one hand, and a remedy such as the return of benefits received under the contract through rescission on the other.

This is not a situation where the activity regulated was a merely peripheral concern of the LMRA,[1] nor did it relate to the vindication of interests which were deeply rooted in local feeling and responsibility in which there were, therefore, overriding state interests.[2] No one has called to our attention any Oregon regulation or common law requiring a union to bargain collectively with a multiemployer group or preventing a union from striking for the purpose of making an employer bargain separately with it where a labor dispute exists. There is no state right which the court is requested to vindicate.

The plaintiffs urge that the rescission of the agreements and recovery of the additional sums paid thereunder "are contractual consequences of the Board's determination" and that the granting by a state court

1. Linn v. United Plant Guard Workers, 383 US 53, 86 S Ct 657, 15 L ed2d 582 (1966); San Diego Bldg. Trades Council v. Garmon, 359 US 236, 79 S Ct 773, 3 L ed2d 775 (1959); International Asso. Machinists v. Gonzales, 356 US 617, 78 S Ct 923, 2 L ed2d 1018 (1958).

2. Linn v. United Plant Guard Workers, supra note 1; Association of Journeymen v. Borden, 373 US 690, 83 S Ct 1423, 10 L ed2d 638, rehearing den., 375 US 872, 84 S Ct 28, 11 L ed2d 101 (1963); San Diego Bldg. Trades Council v. Garmon, supra note 1; Youngdahl v. Rainfair, 355 US 131, 78 S Ct 206, 2 L ed2d 151 (1957); Automobile Workers v. Russell, 356 US 634, 78 S Ct 932, 2 L ed2d 1030 (1958); Auto Workers v. Wisconsin Board, 351 US 266, 76 S Ct 794, 100 L ed 1162 (1956); United Workers v. Laburnum Corp., 347 US 656, 74 S Ct 833, 98 L ed 1025 (1954).

of the relief sought would not interfere with, but rather aid and be in conformance with the Board's policy. They point out that state courts are always available to vindicate federally-created rights.

If it was the Board's belief that the "expunging" of the union's prior unfair labor practices required the union to make restitution of the additional money paid its members, the Board would have so ordered. Congress delegated the following authority to the Board where unfair labor practices were involved:

> "* * * If * * * the Board shall be of the opinion that any person * * * has engaged in * * * any * * * unfair labor practice, then the Board * * * shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this subchapter* * * *." 61 Stat 147, § 10(c), 29 USC § 160(c) (1947). (Emphasis added.)

The restitution of money paid as a result of a contract entered into because of unfair labor practices would certainly come within "* * * such affirmative action * * * as will effectuate the policies of this subsection * * *." A cease and desist order may be a reparation order operating retrospectively. National Labor Rel. Bd. v. Williamson-Dickie Mfg. Co., 130 F2d 260, 263 (5th Cir 1942). The Board's failure to order restitution

indicates its belief that in this instance federal labor policy did not require it.

Plaintiff makes the contention that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of plaintiff's claims against the trustees. Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. As has been previously quoted in this opinion from *Garmon:* "* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant *a remedy* here *which has been withheld from the National Labor Relations Board* only accentuates the danger of conflict." (Emphasis added.)

Plaintiffs contend that their complaints state a cause of suit under 61 Stat 156, 301(a) (1947), 29 USC § 185(a) (1964). The subsection provides:

"(a) Suits *for violation* of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (Emphasis added.)

In Dowd Box Co. v. Courtney, 368 US 502, 82 S Ct 519, 7 L ed2d 483 (1962), the court held that the mention of the federal district court in this statute did not operate to divest a state court of jurisdiction.

The pre-emption doctrine has no application to cases under § 301(a) LMRA even though the violation of the contract is also an unfair labor practice. Smith v. Evening News Assn., 371 US 195, 197, 83 S Ct 267, 9 L ed2d 246 (1962); Teamsters Local v. Lucas Flour Co., 369 US 95, 101 n. 9, 82 S Ct 571, 7 L ed2d 593 (1962); Lodge #12, International Asso. of Machinists v. Cameron Iron Works, 257 F 2d 467 (5th Cir), cert. den. 358 US 880, 79 S Ct 120, 3 L ed2d 110 (1958).

It has been held that suits for reformation of a contract,[3] for specific performance,[4] for declaratory relief determining the contract to be valid and for damages

3. International Asso. of Machinists v. United Aircraft Corp., 190 F Supp 464 (DC Conn 1961).

4. Independent Petroleum Workers of N. J. v. Esso Stand. Oil Co., 235 F 2d 401 (3d Cir 1956).

for its breach,[5] for a declaratory judgment that a provision of the contract is unenforceable because compliance would be an unfair labor practice,[6] and to enjoin violation,[7] are all within the term "suits for violation of contracts" as contemplated by the statute.[8]

The present suits are to rescind the contracts involved, not for their violation. No substantive contract right is being asserted which the court is asked to remedy. The relief requested is directed to the rescission of the contract because of unfair labor practices rather than the enforcement of any rights thereunder. No case has come to our attention where a suit to rescind such a contract was held to be within the statute's purview.[9] To apply § 301(a) LMRA to suits to rescind labor contracts because of unfair labor practices in their procure-

5. Dowd Box Co. v. Courtney, supra.

6. Todd Shipyard Corp. v. Industrial Union of Marine, etc., 344 F2d 107 (2d Cir 1965).

7. Humphrey v. Moore, 375 US 335, 84 S Ct 363, 11 L ed2d 370 (1964).

8. This opinion has treated the suit against the *union* as one for rescission and restitution. It was unnecessary to decide whether it might in fact be a tort action for damages occasioned to the employers because of coercive practices which resulted in the employers paying money to the union's individual members. No money was paid to the union as such but only to individual employees. If in fact it is a tort action, § 301 (a) would have no application. Rock Drilling, Blasting, etc. v. Mason & Hanger Co., 217 F2d 687 (2nd Cir 1954); Burlesque Artists Assn. v. I. Hirst Enterprises, 134 F Supp 203 (DC Pa 1955). If it is in fact a damage action against the union because of unfair labor practices, pre-emption would also prevent its prosecution. San Diego Bldg. Trades Council v. Garmon, supra.

9. A case, which might be construed as indicating a suit for rescission under § 301(a) is not proper, is Adams v. Budd Co., 349 F2d 368 (1965). There the court indicated that actions of parties in entering into a labor contract which violated existing rights were not violations of contract as contemplated by & [sic] 301 (a). The court said as follows:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire.'"

ment would open to regulation by courts almost the entire field of unfair labor practices. We do not believe this was the intention of Congress. The words of the statute have been given a broad construction, but if any significance is to be given to the words "for violation of contracts" a suit such as the present one does not come within its embrace.

The judgment of the trial court is affirmed.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., ET AL., PETITIONERS

v.

HOISTING AND PORTABLE ENGINEERS

LOCAL UNION NO. 701, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This memorandum is submitted pursuant to the Court's order of February 20, 1967, inviting the Solicitor General to express the views of the United States. The facts are set out in the petition for certiorari, the opinion of the Supreme Court of Oregon (Pet. 3–5, 18–19), the Board's decisions and orders (141 NLRB 469, 132 NLRB 648), and the record documents filed with the Court, and may be briefly summarized as follows:

Petitioners were three members of a broader multiemployer bargaining unit, which had a contract with respondent Hoisting and Portable Engineers Local Union No. 701 ("the Union") (141 NLRB 469, 470, 473, n. 8). A collective bargaining agreement between the multiemployer unit and the Union expired on December 31, 1958 (132 NLRB 648, 651). The members of the multiemployer unit sought to bargain for new contract terms through their bargaining representative, Cascade Employers Association, Inc. ("Cascade") (132 NLRB 648, 651; 141 NLRB 369, 470, 472–473). The conduct of those negotiations gave rise to unfair labor practice proceedings before the Board.

The Board found that the Union, in violation of Section 8(b)(1)(B) and (3) of the National Labor Relations Act,[1] restrained and coerced the petitioners and others in their selection of Cascade as their bargaining representative in an established multiemployer unit, and refused to bargain with Cascade. *Hoisting and Portable Engineers Local Union No. 701 (Cascade)*, 141 NLRB 469, 473–474; 132 NLRB 648, 651–653, 655 (Pet. 19–20). As to the petitioners, the Board further found that the Union's pressure succeeded in forcing them to execute individual bar-

[1] Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Section 8(b)(3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees * * *."

gaining agreements with the Union (141 NLRB at 474, 132 NLRB at 652).

In addition to directing the Union to cease and desist from the unlawful conduct, to bargain with Cascade in the multiemployer unit, and to post appropriate notices, the Board's order directed the Union to cease and desist from "[g]iving effect to [these] individual contracts * * * or any modification, continuation, extension, or renewal thereof" (141 NLRB at 474). The Board's final order issued on March 13, 1963 (141 NLRB 469, 474–475). In June 1963, the case before the Board was closed on the ground that the affirmative requirements of the Board's order had been satisfactorily complied with.

Petitioners thereafter commenced suits in an Oregon court against the Union and the trustees of the Union's health and welfare and pension funds (Pet. 18). The complaints recited that, from approximately May through August 1959, the Union had restrained and coerced petitioners in their right to bargain through a multiemployer association, Cascade, and had refused to bargain with Cascade, in violation of federal law; that the Union by such conduct had coerced petitioners into agreeing to separate contracts in violation of federal law; and that the Board, in its decision of March 13, 1963, had found this conduct to be illegal under federal law and had ordered that the contracts be "voided, set aside and of no effect" (Pet. 3, 18–19; R. 2–3, pars. V, VI). The complaints further alleged that, as a consequence of these contracts and of the Union's unlawful conduct, peti-

tioners paid various sums to the Union's health and welfare and pension trust funds[2] and to the employees; and that these sums were paid prior to the Board's decision, under compulsion of the contracts, and would not have been paid except for the contracts and the unlawful conduct of the Union (Pet. 3, 18, 19; R. 3, pars. VII, IX).[3]

The complaints sought rescission of the contracts and restitution from the Union and the trustees of the sums paid thereunder (R. 5).[4] The complaints alleged that recovery from the Union of the sums paid pursuant to the contracts was not a remedy available to petitioners before the Board, that the Union's trust funds and the trustees were not and could not be parties before the Board, and that the Board had no procedures or processes by which the trusts or trustees

[2] The contracts provided for payments into the health and welfare and pension funds established pursuant to agreements between the Union and the Portland Chapter, Associated General Contractors of America.

[3] The sums allegedly paid the employees were "additional wages" under the contracts (Pet. 18). The various sums paid by each Company as additional wages and trust fund contributions were alleged to be as follows (R. 3, *et seq.*, First Cause, par. VII):

Company	Health and Welfare Fund	Pension Fund	Additional Wages
Corvallis Sand & Gravel Co.	$5,020.00	$4,035.70	$21,199.39
Eugene Sand & Gravel Co.	2,996.00	718.20	24,176.05
Wildish Sand & Gravel Co.	4,802.00	1,446.45	28,689.41

[4] From the trustees, the Companies sought to recover only the sums paid into the trusts; from the Union, the Companies sought to recover both these sums and the additional amounts paid to employees as wages under the contracts (R. 5).

could be ordered to make restitution of the amounts paid to the trusts under the requirements of the contracts (Pet. 3–4, 25; R. 3–4, pars. X, III).

The Union and the trustees filed demurrers on the grounds that the complaints failed to state facts sufficient to constitute a cause of action, and that the subject matter of the suits was preempted by the National Labor Relations Act and thus within the exclusive jurisdiction of the Board (Pet. 4, 19; R. 10–11). The demurrers asserted that defendants would further contend that petitioners sought relief from the Board, obtained and accepted such relief, and asked for no more (Pet. 19; R. 10–11). The trial court sustained the demurrers and dismissed the complaints (Pet. 4, 18; R. 12, 15).

The Supreme Court of Oregon affirmed (Pet. 17–28). The court held that petitioners' claims for rescission of the contracts and restitution of the moneys paid thereunder rested solely on the ground that the contracts were procured through the unfair labor practices of the Union (Pet. 21–23, 24). "There is no state right which the court is requested to vindicate" (Pet. 23). Accordingly, the court concluded that the fashioning of a remedy for the wrong that was the gravamen of the complaints was within the exclusive province of the Board, and the State court was thus without jurisdiction of the suits (Pet. 22–25).[5]

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[5] The court quoted from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247: "* * * 'It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may

Addressing itself to petitioners' contention "that the granting by a state court of the relief sought would not interfere with, but rather [would] aid and be in conformance with the Board's policy," the court stated (Pet. 24–25):

> If it was the Board's belief that the "expunging" of the union's prior unfair labor practices required the union to make restitution of the additional money paid its members, the Board would so have ordered. * * * The Board's failure to order restitution indicates its belief that in this instance federal labor policy did not require it.

Respecting the further contention "that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of [the] claims against the trustees," the court added (Pet. App. 25):

> Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief

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be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, *since remedies form an ingredient of any integrated scheme of regulation*, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.'" (Emphasis added by the court, Pet. 21–22.) And the court added (Pet. 22–23): "The determination of the relief to which a party to a collective bargaining agreement may be entitled, where the agreement was obtained by unfair labor practices, is sufficiently important in the regulatory process to be within the sole province of the Board. * * * This is not a situation where the activity regulated was a merely peripheral concern of the LMRA, nor did it relate to the vindication of interests which were deeply rooted in local feeling and responsibility in which there were, therefore, overriding state interests."

> against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. * * *

Finally, the court rejected petitioners' contention that the complaints stated a cause of action which could be entertained under Section 301(a) of the Labor Management Relations Act (29 U.S.C. 185(a)). The court pointed out that the "present suits are to rescind the contracts involved, not for their violation" (Pet. App. 27).

Petitioners do not here challenge the decision below insofar as it holds that their suits against the Union (for additional wages and payments into the trust funds) are preempted by federal law and are within the exclusive jurisdiction of the Board. The petition for certiorari challenges only the court's holding that petitioners' suits against the trustees for the trust fund payments are also preempted (Pet. 3, n. 2).

DISCUSSION

Petitioners urge this Court to consider the extent, if any, to which the jurisdiction of State courts may be invoked to supplement the remedial efforts of the National Labor Relations Board. We believe that

there may well be cases in which Board rulings as to the scope of the appropriate remedy may raise issues relating to State-created rights that may properly be determined by State courts. Thus the Board has expressly left for State resolution the determination of property rights resulting from the Board's disposition of an intra-union schism. *Boston Machine Works Co.*, 89 NLRB 59, 61. This is not such a case, however. For here, as we show below, petitioners sought simply to have a State court augment the relief that the Board gave for the unfair labor practice it found. In the circumstances, we believe that the Supreme Court of Oregon correctly held that the relief sought could be obtained, if at all, exclusively from the Board and that the subject matter of this action, therefore, was preempted by the National Labor Relations Act.

1. Petitioners do not purport to seek relief for any conduct proscribed by State law. As the court below noted, "[t]here is no state right which the court is requested to vindicate" (Pet. App. 23). Petitioners seek a remedy for conduct constituting an unfair labor practice under Section 8(b) (1)(B) and (3) of the National Labor Relations Act, as previously determined by the Labor Board. The Board's cease and desist order is expressly alleged and relied on in the complaints (Pet. 2; Pet. App. 19–20). Petitioners do not dispute (Pet. App. 21) that, under well-established doctrine, the Board—and only the Board—had jurisdiction to determine whether the Union had violated Section 8. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. In these

circumstances, the court below correctly held that the fashioning of a remedy was also within the Board's exclusive primary jurisdiction.

That holding is soundly based on the proposition, frequently reiterated by this Court, that "[t]he particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' *I.A. of M.* v. *Labor Board,* [311 U.S. 72, 82]; *Labor Board* v. *Link-Belt Co.,* [311 U.S. 584, 600]." *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 539–540. At least where, as here, the Board's jurisdiction to determine the substantive issue is exclusive, its power to shape the appropriate remedy is also exclusive, "since remedies form an ingredient of any integrated scheme of regulation" (*Garmon,* 359 U.S. at 247).

Had the issue of recoupment been presented to the Board, it might have concluded that it would be too speculative to attempt to determine the difference between the terms that were negotiated individually and those that might have been negotiated through Cascade; or it might have concluded that a reimbursement order would be excessive for the violations found, or that to impose such a remedy would not be conducive to satisfactory bargaining relations between the parties in the future. Had the Board so ruled, it seems clear that the principles of *Garmon, supra,* would have barred any effort to recoup the benefits in a State court suit brought against the Union, the trustees, or both. Petitioners should not be in any better position merely because they failed

to present the issue of recoupment to the Board.[6] Indeed, petitioners now appear to concede that their suits are preempted insofar as the claims against the Union are concerned (*supra*, p. 7).[7] In any event, the remedy fashioned by the Board in this case was

[6] See n. 9, *infra*, p. 13.

[7] *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, relied on by petitioners (Pet. 10), is not inconsistent with the above analysis. There, the Board found that the employer, through the commission of unfair labor practices, forced his employees to enter into individual contracts whereby they agreed not to demand a closed shop or that the employer sign a contract with any union. The Board ordered the employer, *inter alia*, to cease giving effect to these contracts, and to so notify the employees. This Court sustained the Board's order, construing it as precluding the employer "from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it" (309 U.S. at 365). To be sure, the Court, in answer to the contention that the order was defective because the individual employees were not parties to the proceeding, stated that the Board's order "does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication" (*ibid.*). But, it added (*ibid.*):

> We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. Section 10 (a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice.

It is apparent that nothing in *National Licorice* would sanction an attempt by petitioners, who were parties to the Board proceeding, to obtain, through the medium of a state court suit, a remedy for unfair labor practices which goes beyond what the Board has, or would have, provided.

tailored to the Board's appraisal of the Union's unlawful conduct in the light of national labor policy. For other tribunals to supply other remedies for the very wrong that the Board's cease-and-desist order sought to right would unavoidably entail the danger of conflicting regulation that the *Garmon* rule was designed to forestall.

Furthermore, this clearly is not a case in which particular care must be taken to accommodate the federal regulatory scheme to important State interests or responsibilities. As the court below candidly recognized (Pet. App. 23), the conduct to which petitioners' claim is addressed is neither of "merely peripheral concern" to federal labor law nor has it "touched interests * * * deeply rooted in local feeling and responsibility" (*Garmon,* 359 U.S. at 243–244). Precisely because no State interest whatever was involved, the court below concluded (Pet. App. 25):

> If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended.

In this respect the present case is in sharp contrast to those cited by petitioner (Pet. 7). Thus both *Thacher* v. *United Construction Workers, etc.,* 10 N.Y. 2d 439, 180 N.E. 2d 245, and *People* v. *Automobile Transporters Welfare Fund,* 13 N.Y. 2d 814, 192 N.E. 2d 222, certiorari denied, 376 U.S. 908, involved the relationship between State insurance regulation, which is surely a matter of traditional State concern, and

Section 302 of the Labor Management Relations Act (29 U.S.C. 186), which has not been thought to occupy the field. See *Moses* v. *Ammond*, 162 F. Supp. 866 (S.D. N.Y.).

2. Petitioners urge (Pet. 8–9) that the relief they now seek could not have been obtained from the Board. Assuming, for a moment, that the contention is correct, it does not follow that the State courts have jurisdiction. On the contrary, as this Court wrote in *Garmon*, "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" (359 U.S. at 247).

Furthermore, the assumption that the Board was powerless is mistaken. As the court below observed, the Board could have ordered reimbursement from the Union if it had determined that the illegality involved in procuring the contracts was so pervasive that it could only be cured by restoring to petitioners the health and welfare and pension contributions paid out under the contracts (Pet. App. 24–25).[8] It would be no defense to such an order that the Union did not itself have possession of the moneys that had been paid into the health and welfare and pension funds. *Operative Plasterers' Local No. 2 (Hansen)*, 149 NLRB 1264, 1268–1269; *International Hod Carriers, etc., Local 1082 (Boggs)*, 150 NLRB 158, 165–166, 181; *Plasterers' Local Union No. 739, et*

[8] Section 10(c) of the National Labor Relations Act empowers the Board to require the person who has committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

al. (*Hansen*), 157 NLRB No. 79; see *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 544. Moreover, as petitioners recognize (Pet. 8, n. 6), the Board has also ordered the trustees of union-employer funds to disgorge moneys illegally secured or retained where the trustees were found to be acting as agents of the respondents. *Local 80, Sheet Metal Workers (Turner-Brooks)*, 161 NLRB No. 7; *J. J. Hagerty, Inc.*, 139 NLRB 633, enforced in relevant part *sub nom. Local 138, I.U.O.E.* v. *National Labor Relations Board*, 321 F. 2d 130, 137 (C.A. 2). Accordingly, petitioners' assumption that the Board could not have ordered reimbursement of the moneys paid into the trust funds, had it deemed that remedy appropriate, is erroneous. In these circumstances, to permit petitioners to go into a State court to secure such reimbursement would afford a means of negating the Board's judgment on the appropriate remedy for the Union's unfair labor practices.[9]

3. Finally, petitioners seem to suggest (Pet. 6–7) that the relief they seek is somehow implicitly authorized by the Board's order. Thus they argue that they are only attempting "to wind up" agreements

[9] Petitioners did not seek a reimbursement remedy before the Board although they were parties to the proceeding. The Trial Examiner's original Intermediate Report and Recommended Order provided only that the Union should cease and desist from giving effect to the contracts or any continuation, modification, extension, or renewal—the provision ultimately adopted by the Board. Cascade, as charging party, filed a brief in support of the report and recommended order, and took no exceptions to it.

invalidated by the Board (Pet. 6) or to follow through on the "contractual consequences of the Board's determination" (Pet. App. 23). There is, however, no reason to suppose that restitution either of wages or of trust fund payments was contemplated by the Board or entailed in its order. Where the Board has intended to provide for restitution it has done so quite explicitly (see pp. 12–13, *supra*). Here the Board terminated its proceedings, having satisfied itself that the requirements of its order had been complied with.

Implicit in petitioners' contention that they merely seek to effectuate the Board's order is the assumption that the Board, in ordering that the Union cease giving effect to the unlawfully procured contracts, invalidated the contracts *ab initio* and hence contemplated recoupment of the payments made thereunder. There is no warrant for such a construction of the Board's decision. Petitioners never presented this issue to the Board (see n. 9, *supra*), and, even if they had, there is no reason to believe that the Board would have ordered a return of the benefits paid under the contracts.

Petitioners' contention (Pet. 6) that they merely wish "to wind up the affairs of the trusts as to these employers" in no way obviates the fact that they seek to have a State court enlarge upon a remedy formulated by the Board for an unfair labor practice. The trusts were created and are governed by trust agreements entered into between the Union and the Associated General Contractors of America, Inc.[10]

[10] We are lodging with the Clerk a copy of each of the two trust agreements.

The Board found no infirmity in the trust agreements, as opposed to the collective bargaining contracts, and petitioners allege none. Petitioners, as well as many other employers, made payments into those trusts on behalf of their employees, but those payments are not in any relevant sense distinguishable from wage payments, as to which petitioners have abandoned their claim (Pet. 3, n. 2). Petitioners have no on-going involvement in the administration of the trusts; indeed, they have no more interest in the affairs of the trusts than they have in the ways in which their employees spent or saved their wages. There is, in short, nothing to "wind up."

CONCLUSION

For the foregoing reasons, we believe that the Supreme Court of Oregon correctly determined that petitioners' suits are preempted by the National Labor Relations Act. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITIONERS' REPLY TO MEMORANDUM OF THE UNITED STATES

(Counsel are identified on the following page)

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The question at this point is not whether petitioners are right or wrong, but whether the questions presented

by the petition are so important and uncertain as to justify the further attention of the Court. The brief of the Solicitor General has resolved any lingering doubts, for it demonstrates that they are both important and unsettled.

1. His brief concedes, if only by failing to claim the contrary, that the Board has no jurisdiction, "arguable" or otherwise, over the trustees. See *Marine Engineers v. Interlake S.S. Co.*, (1962) 370 US 173 at 180-184. Consequently, if petitioners' action against the trustees cannot be maintained in state court, it cannot be maintained at all.

2. It is also clear from the Solicitor General's brief that he, like petitioners, has been unable to find answers to the questions presented by the petition in the decisions of this Court. He has not cited a single case sustaining pre-emption of claims in state courts against third persons who are not subject to the Board's jurisdiction. The question of the effect of Board decisions on collateral interests and persons lying beyond the Board's jurisdiction is unresolved (*National Licorice Co. v. National Lab. Rel. Board*, (1940) 309 US 350 at 365) and cannot be disposed of by the erroneous generalization that petitioners merely seek a supplemental "remedy" for an unfair labor practice.

The extent to which national labor policy must

impinge on these collateral relationships is a problem requiring the same delicate adjustment of competing interests which has characterized recent decisions of the Court. The Solicitor General's position, if accepted, would extend pre-emption to every remote relationship affected by the Board's acts, whether or not it can operate upon the persons or the subject matter of those relationships. That approach is out of touch with the Court's decisions and the concern they evidence about the expansion of federal pre-emption over private rights and the jurisdiction of state courts. It is a far-reaching attack on the power of state courts to adjudicate claims of their citizens to property within their jurisdiction.

3. The basis of the Solicitor General's conclusion that the state court lacks jurisdiction over this action is his erroneous contention that petitioners seek a supplemental "remedy" for conduct constituting an unfair labor practice.[1] This is not so: This action concerns only the collateral consequences of the Board's decision as to third persons over whom it has no authority. The question is not whether the court should grant additional relief against the union. It is whether the Board's deci-

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[1] The Supreme Court of Oregon, like the Solicitor General, regarded the action as one to regulate the union's unlawful conduct; it disregarded the Board's decision and denied recovery, in part, because the conduct which produced that decision did not violate state law.

sion, which the state court must recognize,[2] has terminated the trustees' right to retain the funds. If the trustees sued for contributions under the annulled contracts, petitioners could surely plead the Board's decision as a defense. That defense is not pre-empted; it is the necessary consequence of the Board's decision. **This action no more seeks to remedy conduct constituting an unfair labor practice than if the Board's decision were pleaded as a defense to an action by the trustees for contributions.**

Petitioners ceased to contribute to the trusts when the trial examiner rendered his first decision, two years before the Board's final decision. They might well have done so at an earlier time. The right to the funds held by the trustees should not depend on the fortuitous circumstance that they did not stop making payments earlier.

4. The position of the Solicitor General is inconsistent. He concedes that some questions which arise by reason of Board decisions must be left to state adjudication, even as to persons before the Board (Br 7-8); but he does not want the Court to consider a case which squarely presents the issue as to persons and claims beyond the Board's jurisdiction. He concedes that the regulation

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[2] *Pittsburgh P. Glass Co. v. National Lab. Rel. Bd.*, (1941) 313 US 146 at 155 and *Carey v. Westinghouse Electric Corp.*, (1964) 375 US 261 at 272.

and liquidation of trusts is a function of the states, not the Board (Br 11-12); yet he objects to the Court's consideration of a case in which petitioners seek the return of assets paid to trustees under a contract which the Board has set aside.

In short, the Board's decision involved the rights and obligations of third persons for whom it must necessarily have important legal consequences. The Solicitor General does not claim that the Board can regulate those persons or determine those consequences, and his claim that this action is pre-empted will, if accepted, prevent anyone else from doing so, all to effectuate a jurisdiction which the Board concededly does not have.[3]

5. Finally, reference must be made to his meaningless assertion that petitioners have no "on-going involvement in the administration of the trusts" and that these funds are "not * * * distinguishable from wages (Br 15). This overlooks the essential fact that the funds are held by third persons whom neither petitioners nor their employees control. Nor are they of benefit to petitioners'

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[3] Even if the Board could require the union to reimburse petitioners, a matter which is not wholly clear, this is not the interest which petitioners seek to assert. The theoretical availability of a discretionary Board remedy for an unfair labor practice is not a basis for holding that rights otherwise available under state law are pre-empted. *Linn v. Plant Guard Workers*, supra, (1966) 383 US 53 at 66-67. Nor is it a justification for third parties to retain funds which are improperly held.

employees who do not qualify under the trust agreements. If petitioners have no "on-going involvement" with the trusts, they can only look to the courts for relief from their retention of funds received under an illegal contract. The Solicitor General's contention merely demonstrates what petitioners assert, that this action, which involves only the trusts, is collateral to the unfair labor practice of the union and is beyond the authority of the Board.

CONCLUSION

The Solicitor General does not ask the Court to deny certiorari because the issues are insubstantial, but merely to effectuate a new and aggressive claim to exclusive jurisdiction over areas where it is conceded the Board has no jurisdiction. He has addressed himself to the merits in terms which emphasize the fundamental importance of the questions before the Court. The petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

April 21, 1967